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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 305

THE BRENNAN CONSTRUCTION COMPANY, INC., a corporation, *Petitioner,*

vs.

COLORADO SPRINGS COMPANY, a corporation; J. FRED ABRAHAMSON and EDWARD O. ABRAHAMSON, individually and dba ABRAHAMSON BUILDING & SUPPLY CO. and dba A.B.C. HOMES; GEORGE H. KRAUSE; ALBERT B. LOGAN; ANTLERS HOTEL COMPANY, a corporation; THE RANSON-DAVIDSON COMPANY; S. H. RANSON, JR.; CLAUDE I. DEPEW; J. O. DAVISON; D. W. VINK; JOHN D. McCALL; HOBBY H. McCALL; WENDELL S. HOLMES, individually and as attorney-in-fact for John Denman, Jr.; DOROTHY J. KRAUSE; and Maurice Newton, Donald S. Stralem, Leonard D. Newborg, Frederick M. Peyser, Pierre Stralem, Hugo F. Van Stallie, Herbert R. Strauss, Fred M. Kauffman, A. B. Fletcher, and John Wallace as co-partners doing business under the name, style and description of HALLGARTEN & CO., attorneys-in-fact for Dorothy Palmer and Elsie Myers; *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

JOHN H. GATELY,
Counsel for Petitioner.

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COLORADO SPRINGS COMPANY, a corporation, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

To the Honorable, The Supreme Court of the United States:

The Supreme Court of Colorado is the highest court of appellate jurisdiction in Colorado.

(1. a)

The opinion of the Supreme Court of Colorado in the instant case is not as yet reported and is therefore, appended hereto. (Appendix 2.)

(b)

STATEMENT OF GROUNDS FOR JURISDICTION

Jurisdiction of this court is invoked because the decision of the Supreme Court of Colorado conflicts with the decisions of this court and of other courts throughout the country, because it denied to the Petitioner its right to its

day in court and to be heard on a matter that was submitted for decision, contrary to the due process and equal protection of the law as guaranteed by the 14th Amendment of the United States Constitution.

Your petitioner, the Brennan Construction Company, Inc., respectfully represents that it is aggrieved by the final judgment of the Supreme Court of Colorado entered April 23, 1956, (A. 4), affirming the judgment of the district court of El Paso County, which dismissed its complaint on a motion for summary judgment that was based upon a plea of *res judicata*. This judgment interposed to sustain the plea was rendered "without prejudice," on a technicality in pleading, contrary to all decisions of this court and other courts of this country. The Supreme Court of Colorado in affirming the dismissal of the lower court, in order to avoid the Federal question, based the same upon a motion to dismiss the Writ of Error to which a motion to strike was filed by the Petitioner. Leave had been granted to Petitioner to file its reply to the brief of Respondents on their motion to dismiss after the determination of the motion to strike. The Respondents filed a reply brief to the motion to strike and the same was then pending before the Supreme Court; yet, despite this fact, the Supreme Court of Colorado as may be seen by the opinion attached hereto as Appendix 2, utterly disregarding Petitioner its right to its day in court, and a hearing on the matter then presented, arbitrarily and capriciously affirmed the motion to dismiss, thereby denying to the Petitioner its right to due process and equal protection of the laws as guaranteed by the Federal Constitution.

The Petitioner, on its appeal to the state Supreme Court, raised a Federal question pertaining to due process and equal protection by reason of the lower courts judgment based on plea of *res judicata* and in its petition for rehearing filed in the Supreme Court of Colorado it enumerated nothing but Federal questions and Federal rights and yet said court denied the same.

That the state Supreme Court has by its decision denied the Petitioner herein a title, right, privilege and immunity that was especially set up and claimed under the Constitution of the United States, being a Federal question of substance not heretofore determined by this court and in a way not in accordance with applicable decisions of this court.

(2)

The opinion of the Supreme Court of Colorado was rendered March 12, 1956, a petition for rehearing was duly filed and denied April 23, 1956. An extension of time for filing the Petition for Certiorari was granted by this court on July 20, 1956 to August 13, 1956.

(3)

Statutory Provisions Relied Upon by Petitioner to Confer Jurisdiction on This Court are Invoked Under 28, U.S.C.A. 1257.3.

(3. c)

QUESTIONS PRESENTED FOR REVIEW

1. The Supreme Court of Colorado in its order of dismissal of the Writ of Error, has failed to afford the Petitioner its fundamental rights guaranteed by the due process and equal protection clauses of the 14th Amendment of the United States Constitution by;

a. Denying Petitioner its day in court, by passing on a motion to dismiss, when a motion to strike the motion to dismiss was pending, as provided for under the rules of civil procedure, Colorado Revised Statutes C.R.S. Volume I, Rule 12 (f), and refusing to allow Petitioner an opportunity to file a reply brief to the brief of Respondents on the motion to dismiss, contrary to its previous order permitting the same, thereby denying Petitioner its day in court and changing the universal rule of law that a litigant is entitled to a hearing on questions pending for determination.

b. Arbitrarily and capriciously failing to take cognizance of the unchallenged order of the lower court permitting referral to the records on file in the Supreme State Court in the previous case, which records showed conclusivley that the former action was dismissed "without prejudice" on a technicality in pleading and that, therefore, the plea of *res judicata,* based thereon, could not be legally sustained.

c. Failing and refusing to pass on the question of *res judicata*; and reversing the decision of the lower court because the judgment on which said plea was based was entered "without prejudice" on a technicality in pleading. By refusing to follow its former decisions and the universal law of appellate tribunals by referring to its records to determine the invalidity of the plea of *res judicata.*

d. Failing to apply the applicable statutes of Colorado pertaining to oral contracts, which the lower court had illegally found to be inapplicable and which conflicted with its previous order, based on another statute, and that the statute upon which Petitioner relied and the decisions thereunder were both illegally and unlawfully overruled.

e. Depriving Petitioner of its property by sustaining the plea of *res judicata* when the facts of record showed the previous action was dismissed "without prejudice," contrary to its own previous decision and the universal law of the land in this respect, after having granted relief to others in similar circumstances in the same territorial jurisdiction.

f. Refusing to grant the petition for rehearing which was based on the Federal questions.

g. Deciding Federal questions of substance never heretofore determined by this court and in a way not in accordance with applicable decisions of this court, contrary to the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

(3. d.)

CONSTITUTIONAL PROVISIONS, STATUTES

The Constitutional provision relied upon in the instant case is the due process and equal protection of the law clauses of the 14th Amendment of the Constitution of the United States.

Colorado Revised Statutes, 1953. Rules of civil procedure 12 (f), motion to strike. (Appendix 6.)

Colorado Revised Statutes, 1953. Chap. 59 - 1 - 8. (Appendix 6.)

Colorado Revised Statutes, 1953. Chap. 59 - 1 - 10 (Appendix 6.)

(3. e.)

CONCISE STATEMENT OF THE CASE

A complaint was filed by Petitioner in the District Court of El Paso County, Colorado, No. 31503, to recover damages for breach of an oral contract that had been entered into with Respondents, the Colorado Springs Company, a corporation, and its President, George H. Krause, on the 28th day of May, 1950, wherein said respondent company agreed to convey to the Petitioner 1,000 building sites owned by it in the northeast section of Colorado Springs, upon which Petitioner was to erect houses, a shopping center and apartment buildings.

The respondent company agreed to advance up to $20,000, to be used by the Petitioner for the cost of labor for the erection of the first twenty-four houses.

That to obtain financing, it was necessary to have a written agreement, which was dated August 18, 1950, wherein 71 lots were conveyed to the Petitioner. (Exhibit 5; Appendix; S.C.C. 17217) Petitioner had taken possession of said property and had 24 houses in various stages of construction and sold, when on December 1, 1950, respondent company entered into a conspiracy with the Abrahamson Company and the other Respondents to deprive Petitioner of the profits to be derived from said agreement, and forced the Petitioner to execute a fraudulent release contingent upon a supplemental agreement, which agreement was never delivered to the Petitioner. The Petitioner performed the provisions of the supplemental agreement, but the respondent company refused so to do.

Thereupon, Petitioner filed the first action above referred to, and Respondents filed a motion for summary judgment based on the Statute of Frauds and Petitioner pleaded possession and part performance, as taking the

case out of the Statute of Frauds (C.R.S. Chap. 59-1-10), but the court dismissed the complaint August 11, 1953 "without prejudice." (App. Cs. 17217, Fo. 382. Appendix 5.).

Colorado has abolished the distinctions between law and equity, and Petitioner relied thereon in submitting the former equitable plea of possession and performance, but the lower court held that this could not be done, as set out in Fo. 403-407, Appendix Case 17217, (Appendix 5.).

This judgment was upheld by the Supreme Court of Colorado in Case No. 17217 without opinion.

Thereafter Petitioner filed its present complaint (Fo. 1, R. 10), setting up the facts as set out in the former action, and alleging further that the Respondents had, in accordance with the conspiracies charged, converted various supplies, tools and equipment to their own use. (Par. 6, R. 14.).

That it requested equitable relief, specific performance (Par. 4, R. 22), to which Petitioner could plead partial performance and possession, in order to cure the so-called defect of the previous pleading. It requested a judgment for $6,000, together with interest and exemplary damages for money advanced by the Petitioner for labor and withholding taxes, which the lower court and the State Supreme Court ignored.

The Respondents filed answers (R. 25-52), in which they all set up that the complaint failed to state a claim against them, admitted the execution of the written contract, the release, and denied all other allegations of the complaint, and all pleaded the Statute of Frauds to the oral contract. As their 5th defense (R. 28), they pleaded the former action No. 31503, District Court, affirmed by the Supreme Court of Colorado No. 17217, as *res adjudicata* of the present action. They also alleged that the Petitioner had elected to sue for damages in the former action, and is, therefore, now estopped.

On January 1, 1954, Respondents filed their motion for summary judgment, based on the ground of *res judicata,* and the court dismissed the cause thereon, (R. 56, 67.).

A stay of execution was entered by the court for 30 days from March 30, 1955, and an additional 30 days if reporter's transcript was ordered within said time, which was done. Petitioner filed a designation of record, which included the reporter's transcript, and the Respondents thereafter, on May 9, 1955, filed a designation of record and, among other things, requested the reporter's transcript. Thereafter, Petitioner petitioned the court to clarify the record, and the court entered an order in which it stated that the Record of the Supreme Court No. 17217 offered by the Respondents, consisting of the pleadings and orders entered in Case No. 31503, "may be considered and referred to in this case by reference thereto." (R. 59).

Writ of Error was duly issued by the Supreme Court of Colorado, brief of the Petitioner was filed therein, and under point 1.a. Petitioner raised the point that the plea of *res judicata* cannot be sustained because the former action was dismissed "without prejudice" on a technicality in pleading, that to hold said judgment as a bar in the instant case would deprive the Petitioner of the equal protection and due process of law as guaranteed by the Federal Constitution.

Thereafter Respondents filed a motion to strike the reporter's transcript from the record, and despite the fact that the Supreme Court had extended the time for the filing of the record, as set out in the order filed August 17, 1955, and order extending time to October 10, 1955, said Supreme Court struck the same.

Thereafter, the Respondents, on January 26, 1956 (R. 80) filed a motion to dismiss the Writ of Error because of the lack of the reporter's transcript. On February 2, 1956 (R. 85) Petitioner filed its' motion to strike the

motion to dismiss and a motion to extend the time of Petitioner to answer the brief filed by Respondents with their motion to dismiss, (R. 83) pending the determination of the Supreme Court of Colorado of the motion to strike. The Supreme Court of Colorado, on February 9, 1956 (Ap. 1, R. 86) entered an order extending the time for the Petitioner to file its' reply brief to the motion to dismiss, until the determination of the motion to strike.

Thereafter, on March 12, 1956, the Supreme Court entered its' order dismissing the Writ of Error, (R. 87, 90). On March 27, 1956 (R. 91-97, App. 3), Petitioner filed its petition for rehearing, in which it challenged the opinion of the Supreme Court of Colorado as being contrary to the due process and equal protection of the laws as guaranteed by the Federal Constitution, in allowing the motion to dismiss, when a motion to strike was then pending before said court, and leave had been given by it for Petitioner to file a brief to the motion to dismiss; said brief to be filed after the court had passed upon Petitioner's motion to strike. It also set out that the Supreme Court of Colorado had, by denying the Petitioner its day in court, and its refusal to overrule the lower court's order based on *res judicata*, and its refusal to refer to its records as provided by the order of the lower court, denied it the equal protection and due process of law as guaranteed by the Federal Constitution. That in and by said opinion said court had entered an arbitrary and capricious decision in conflict with the fundamental precepts of law and denied rights which said court had formerly held, and which is the universal law; that it took judicial notice of its' opinions and records, but in and by said opinion, it capriciously and arbitrarily refused to take judicial notice of those opinions and records, and stated that because of the striking of the reporter's transcript, it could not pass upon the question of *res judicata*, and that therein and thereby, said court overruled all of its' previous opinions, and also overruled the uncontested order of the lower court, which pro-

vided that the records of the former case, No. 17217, in the Supreme Court of Colorado, should be considered by referral to said records, all contrary to the due process and equal protection clauses of the Constitution of the United States. (App. 3.)

Thereafter, on April 23, 1956, said court denied the Petition for rehearing. (Ap. 4, R. 98.)

(3. h.)

CONTENTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE SUPREME COURT OF COLORADO BY DISMISSING PETITIONERS WRIT OF ERROR TO THAT COURT, HAS DENIED PETITIONER ITS FUNDAMENTAL RIGHTS GUARANTEED BY THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, BY;

(a) *Denying Petitioner its' day in court and a right to a hearing on questions pending for determination.*

The Supreme Court of Colorado had pending before it a motion to strike the motion to dismiss, filed by the Respondents herein. At the filing thereof, that court granted to the Petitioner an extension of time in which to file its reply to the motion to dismiss, until that court passed on the motion to strike. (Appendix 1.) Yet, despite this state of the record, when no motion to dismiss was pending, and the only thing before that court for determination was the motion to strike, said court entered an order dismissing the Writ of Error, based on the motion to dismiss, thereby denying to the Petitioner its day in court. It, also, thereby, refused Petitioner its right under its order, to file a reply brief to the motion to dismiss and, thereby, denied Petitioner its right to be heard thereon.

No other court in the land holds that when a motion to strike a motion is pending, without any hearing, disregarding the right of Petitioner to file a brief and be heard on the motion to dismiss, could the court arbitrarily consider the motion to dismiss and allow the same.

The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer and a reversal by this court.

As this court stated in the case of *Hovey* vs. *Elliott*, 167 U. S., 409-414:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

This fundamental doctrine was also enunciated by this court as far back as *Windsor* vs. *McVeigh*, 93 U. S. 274, 277. We respectfully submit that we can find no case exactly in point in the annals of the judiciary of this country, where a court has had a matter pending before it and deliberately avoided it and decided another question not then in issue. We submit that it is novel to the jurisprudence of this country, and it is obnoxious to all enunciated legal principles.

The theory requiring that petitioner be allowed his day in court under the clauses of the 14th Amendment of the Federal Constitution has been pronounced by this court before; in *Truax* vs. *Corrigan*, 257 U. S., 312-322; *American Railway Express Co.* vs. *Kentucky*, 273 U. S., 269; *Harding* vs. *Illinois*, 196 U. S., 78; *American Railway Express Co.* vs. *Comm. of Kentucky*, 273 U. S., 269, 333-334, *Natl. Union of Cooks and Stewards* vs. *Arnold*, 348 U. S. 37, 47.

We respectfully submit, that the above cases clearly elucidate the fundamental rights guaranteed the Petitioner by the 14th Amendment of the Constitution of the United States, which are directly opposed to the arbitrary and capricious decision of the Supreme Court of Colorado, which is in conflict with all precepts protecting private rights and, therefore, should be reversed and remanded.

(b)

Arbitrarily refusing to follow the order of the lower court permitting referral to its' records in the previous case, which showed conclusively that the action relied upon to sustain the plea of res judicata was dismissed "without prejudice" on a technicality in pleading and could not, therefore, be legally sustained.

The District Court, in the instant case, entered an order August 15, 1955, (R. 59), wherein on Page 2, thereof, that court held:

> "It is further ordered that the pleadings, motions and orders in Case No. 13503 entitled Brennan Construction Co., etc. (Supreme Court No. 17217)—need not be duplicated as exhibits in the record on error in Case No. 32867, but may be referred to by reference to the record in Case No. 31503 (Supreme Court No. 17217.)"

This order stands in the record, no objection was made thereto, and no point was made by either party to reverse or overrule the same; the same was binding upon the State Supreme Court, which conclusively allows Plaintiffs in Error to refer to the record on error in Case No. 31503 (State Supreme Court No. 17217).

We respectfully submit that by ignoring this order, the state court has changed the universal rule of law and, therein and thereby, denied to Plaintiffs in Error, equal protection and due process of law as granted by the United States Constitution. *Hooven & Allison* vs. *Evatt*, 324 U. S. 652, 659.

If the judgment is permitted to stand, deprivation of Petitioner's property is accomplished without its ever having had an opportunity to defend against the exaction.

The State Supreme Court refused to consider its records on file (in Case 17217, Appendix 5) which shows conclusively that the plea of *res judicata* upon which the

lower court based its judgment of dismissal, had no merit because the judgment sought to be interposed to support such plea had been rendered "without prejudice" and on a technicality in pleading.

Thus by denying it, the only remedy available for the enforcement of its right to its property,-damages, the judgment deprived plaintiff of its property contrary to all fundamental precepts of the law.

The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer.

See *National Union of Marine Cooks and Stewards* vs. *Arnold,* 348 U. S. 37, 47, *Truax* vs. *Corrigan,* 257, U. S. 312.

(c)

Failing and refusing to pass on the question of res judicata; and reversing the decision of the lower court because the judgment on which said plea was based was entered "without prejudice" on a technicality in pleading. By refusing to follow its former decisions and the universal law of appellate tribunals by referring to its records to determine the invalidity of the plea of res judicata.

We submit that the right of action of the Petitioner is a substantive Federal right, which was duly asserted in the lower court when the plea of *res judicata* was filed thereto, which was not based on any recognizable legal grounds. Yet the lower court sustained the same, thereby denying to the Petitioner its rights as aforesaid; and the State Supreme Court, in furtherance of the denial of said rights to the Petitioner, dismissed said Writ of Error purportedly based upon a state rule of practice, which this court has asserted cannot be done.

Atlantic Coast Line Ry. vs. *Mines,* 242 U. S. 532.

Petitioner's vested cause of action was its property right, and it should be protected from arbitrary interference (*Prichard* vs. *Norton,* 106 U. S. 124, 132), and although it has no private right in any particular form of remedy, it is guaranteed by the 14th Amendment of the Federal Constitution its substantive right to redress by some effective procedure. (*Gibbes* vs. *Zimmerman,* et al, 290 U. S. 326, 332), which was not afforded it by the arbitrary and unconscionable denial of its right to a hearing by the State Court's decision. *Hughes* vs. *U. S.*; 71 U. S. 232; *Bissell* vs. *Spring Valley Twp.,* 124 U. S. 225; *Amer. Ry. Exp. Co.* vs. *Ky.,* 273 U. S. 269.

There was no decision on this question; it was ignored. By its decision the State Court evaded the Federal Constitutional question presented by Petitioner in its brief filed in support of the Writ of Error, wherein Petitioner therein specifically set out that the lower court by its decision had denied Petitioner equal protection and due process of the law as guaranteed by the 14th Amendment of the Constitution of the United States. The judgment, therefore, amounts to a mere arbitrary assertion of power and is in clear conflict with those fundamental precepts of jurisprudence which have been established for the protection and enforcement of private rights: *Pennoyer* vs. *Neff,* 95 U. S. 714-733; *Truax* vs. *Corrigan,* 257 U. S. 312, 329; *Leathe* vs. *Thomas,* 207 U. S. 93, 99; *Hovey* vs. *Elliott,* 167 U. S. 409; *McVeigh* vs. *U. S.,* 11 Wall. 259; *Natl. Union* vs. *Arnold,* 348 U. S. 37, 47.

In failing to overrule the lower courts decision allowing the plea of *res judicata,* as a bar to the Petitioner's claim, the state court has arbitrarily and capriciously refused to take cognizance of the order permitting referral to the record in the former case which conclusively established that the former judgment was dismissed "without prejudice" on a technicality, and thereby denied Petitioner its' rights, contrary to the due process and equal protection clauses of the 14th Amendment of the Federal Con-

stitution. *Swift* vs. *McPherson,* 232 U. S. 51; *Wiggins Ferry Co.* vs. *O. & M. Ry.,* 142 U. S. 396.

We respectfully submit that in the instant case there was no effective legal procedure, and, therefore, the judgment should be held as a nullity.

(d)

Failing to apply the applicable statutes of Colorado pertaining to oral contracts, which the lower court had illegally found to be inapplicable and which conflicted with its previous order, based on another statute, and that the statute upon which Petitioner relied and the decisions thereunder were both illegally and unlawfully overruled.

Contracts when made under a state statute, according to a decision of the highest court of the state, or its organic law, cannot be invalidated by a subsequent decision altering the construction thereof. *La. ex rel. So. Bank* vs. *Pilsbury,* 105 U. S. 278; 302; *Douglass* vs. *Pike County,* 101 U. S. 677; 688; *German Sav. Bank* vs. *Franklin County,* 128 U. S. 526, 535.

> *Rd. Comm.* vs. *E. Texas Ry. Co.,* 264 U. S. 79, 86.
>
> "Where it becomes necessary to consider whether or not a state is depriving or attempting to deprive a litigant of property without due process of law, in violation of the 14th Amendment of the Federal Constitution, and the question turns on the existence and terms of an asserted contract, the Supreme Court determines for itself whether there is a contract and what are its terms."
>
> *Columbia Water Co.* vs. *Columbia Electric,* 172 U. S. 475;
>
> Where one party has claimed rights under a contract authorized by a state statute, and the other party has conflicting rights under another state statute, the Supreme Court has jurisdiction.

We submit that this is precisely in point in the instant case. In this case the real point in controversy, as decided

by the lower court, was whether or not the prior judgment, which was entered "without prejudice" and on a technicality in pleading, could sustain the plea of *res judicata*. As this court may have noted, the original complaint was filed under the existing statutes of Colorado, which had done away with the old format of actions at law and actions in equity. The defendant in that case pleaded the statute of frauds (C.R.S. Chap. 59-1-10) (App. 6), and the plaintiffs relied upon the exception to said statute (C.R.S. Chap. 59-1-8) (App. 6), which overcame the statute of frauds by partial performance and possession. This, plaintiffs in said action attempted to do, but were overruled by the lower court, and a Writ of Error was taken, which the Supreme Court of Colorado affirmed without opinion. The court in that action, as heretofore set out, dismissed the complaint "without prejudice" and held that plaintiff had mistaken its remedy, and in order to avail itself of the plea of partial performance and possession it would be necessary to file a bill in chancery, asking for specific performance; that was the only way the plaintiff could take advantage of the statute (C.R.S. Chap. 59-1-8) (App. 6) and offset the plea of the statute of frauds.

This question was necessarily presented on appeal in this case and involves a conflict between the two statutes, and that, therefore, this court should take jurisdiction and resolve the same.

That under the oral contract of petitioners it was entitled to recovery under the statutes of Colorado pertaining to performance and possession as avoiding the statute of frauds. The lower court, however, entered a conflicting order which should have been reversed and the statute upon which the defendants relied overruled.

These questions were presented to the state court on Petitioners petition for rehearing (Appendix 3), with authorities sustaining them, but said court ignored them and refused to grant a rehearing, possibly to prevent a review by this court.

(e)

Depriving Petitioner of its property by sustaining the plea of res judicata when the facts of record showed the previous action was dismissed "without prejudice," contrary to its own previous decision and the universal law of the land in this respect, after having granted relief to others in similar circumstances in the same territorial jurisdiction.

This point was first raised in the petition for rehearing.

We respectfully submit the case of *Brinkerhoff-Faris Co.* vs. *Hill,* 281 U. S. 673, 678, 679, 682, as impelling on the above point. In that case, this court held that when a rule of law upon which a Petitioner had no knowledge, until the decision of the state court had changed it and by the state court applying the new rule of construction, and in refusing relief because, thereof, this court found that such action transgressed the due process clause of the Fourteenth Amendment to the United States Constitution. That the additional Federal claim thus made, (after the opinion of the state court) was timely, since it was raised at the first opportunity, and the court granted certiorari. As stated by this court at page 678:

> "First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution to equality of treatment."

In the instant case, the state court, contra to all its previous decisions, (*Rice* vs. *Bank*, 122 Colo. 244; 221 P. 2d 378; *Brinkard* vs. *Spencer*, 72 Colo. 396) has refused to take judicial notice of its records, in accordance with the weight of authority throughout the country, as stated by this court in; *Troxell* vs. *Del. Lack. & W. Ry.*, 227 U. S. 434, 435.

> "An appellate court takes notice of its own records so far as they pertain to a case under consideration. That court, therefore, would judicially know that the judgment appealed from was affirmed upon a former appeal, to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal."

In the instant case, the converse is true. The record shows conclusively that the former judgment could not be a bar.

This court also held in the case of *Hooven and Allison* vs. *Evatt,* 324 U. S. 652, 659:

> "In all cases coming to us from state courts, we pay great deference to its determinations of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or reference to the facts is necessary to the determination of the precise meaning of the Federal right or immunity, as applied, we are free to re-examine for ourselves whether the asserted right or immunity is to be sustained."

This court has frequently held that it takes judicial notice of its own records, and if not *res judicata,* it may on the principle of *stare decisis,* rightfully examine and consider the decision in a former case as affecting the consideration of a later case involving one of the same parties. *DeBearn* vs. *Safe Deposit and Trust Co.,* 233 U. S. 24, 32; *Swift* vs. *McPherson,* 232 U. S. 51, 56.

Relying thereon, Petitioner submitted its arguments respecting *res judicata* as not being maintainable to support the judgment of dismissal by the lower court, because, from the record on file and the order entered by the lower court permitting referral to said record, rather than placing it in the transcript, it was obvious that the previous judgment relied upon to support the plea of *res judicata* was dismissed "without prejudice" and on a technicality only, and, therefore, could not sustain the plea.

The Petitioner set out in its brief filed in the Supreme Court of Colorado, in the instant case, that the lower court sustained the plea of *res judicata,* and dismissing the complaint with the record before it, was a denial of the equal protection and due process of law clauses of the 14th Amendment of the Federal Constitution, and the Supreme Court of Colorado, based thereon, should have reversed the same. We respectfully request this court to do this in the instant case.

A similar situation arose in the case of *Great Northern Railway Co.* vs. *Sunburst Oil and Refining Co.* 387 U. S. 358, 367, wherein the Supreme Court of Montana, reversed a previous ruling, upon which the Plaintiff in that case had relied, on page 367, this court points out that, "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right, this court will declare the same unconstitutional and grant relief," and as this court also states in that case, "This latter objection the Petitioner could not make in advance of the event," which we respectfully submit is true in the instant case, and that therefore, the unconscionable, arbitrary, and illegal judgment of the state court should be reversed.

CONCLUSION

The decision of the Supreme Court of Colorado in this case conflicts with the decisions of this court, and of all other courts of the country, by denying Petitioner its day in court and a hearing, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The denial of this fundamental right is abhorrent to all the precepts of the law of the land, and should be cured by this court to maintain the structure of the law that has been built up through the centuries, in order to safeguard the fundamental rights and properties of individual citizens.

Petitioners submit that this court should take jurisdiction of this controversy to cure the manifest injustice and utter disregard of fundamental precepts of law as evidenced by the state court's decision. All the decisions of the land demand that a litigant have a fair and impartial trial, that he be given his day in court and a hearing on the issues presented for determination. These rights are basic to our mode of civilization.

Disregarding then, the invalid decision of the state court, on the alleged procedural point, this court can readily see that Petitioner has a meritorious claim, and that the decision of the lower state court dismissing the complaint because of *res judicata* is without merit, because the judgment relied on as a bar was dismissed "without prejudice," on a technicality. Contrary to the well settled principles of law, as enunciated by this court and all the courts of this country.

The reporters' transcript is not necessary for a determination of the issues involved, because by the order of the lower court, and the universal law, an appellate tribunal takes judicial notice of its own records. From those records, and the pleadings, and the orders in the record, it is a simple matter to determine the issue of *res judicata* which the state court probably did not wish to do because of the Federal Constitutional question involved, and sought to avoid it by raising an arbitrary and capricious procedural question and in passing on the petition for rehearing must have considered the Federal questions presented, but denied the same.

That the State Supreme Court has decided Federal questions of substance not heretofore determined by this court, and has decided them in a way not in accord with applicable decisions of this court and contrary to the United States Constitution.

Cases upholding jurisdiction under similar circumstances:

Johnson vs. *Risk*, 137 U. S. 300, 307.
Leathe vs. *Thomas*, 207 U. S. 93, 99.

Respectfully submitted,

JOHN H. GATELY,

Counsel for Petitioner.

Thursday, February Ninth, A. D. 1956

THE BRENNAN CONSTRUCTION COMPANY, INC., a corporation, *Plaintiff in Error,* vs. 17704 COLORADO SPRINGS COMPANY, a corporation, et al, *Defendants in Error.*	*Error to the District Court of El Paso County, Colorado.*

Upon consideration of the motion of the Defendants in Error, it is this day ordered that additional time for filing answer brief in the above cause be granted until ruling on motion to dismiss.

Upon consideration of the motion of the Plaintiff in Error, it is this day ordered that additional time for filing answer brief on motion to dismiss be granted until ruling on motion to strike motion to dismiss in the above cause.

Appendix 1.

OPINION OF THE COURT

Following the issuance of Writ of Error in this cause, and on December 15, 1955, the reporter's transcript lodged by Plaintiff in Error was stricken on motion of Defendants in Error.

January 13, 1956, Plaintiff in Error filed its opening brief and a copy thereof was served on Defendants in Error. January 26, 1956, Defendants in Error filed a motion to dismiss. The matter now stands before this court on the questions raised by the motion to dismiss the Writ of Error.

The grounds upon which the motion to dismiss is based are as follows:

1. That it appears from the brief of Plaintiff in Error that the grounds on which it relies for reversal of the judgment of the trial court depend upon the proceedings had and evidence introduced upon the trial of the cause and which are disclosed only by reference to the reporter's transcript.

2. That the reporter's transcript having been stricken, none of the matters relied on for reversal can properly be considered by the court.

3. That no ground for reversal is alleged or urged in the brief of plaintiff in error based upon the record on error apart from the reporter's transcript.

The only matters now properly before this court are those disclosed by the record of the clerk of the trial court. This record consists of the amended complaint, the answers filed by the several defendants, the petition to strike appearances and answers and for default, the orders denying said petition, defendants ...otion for summary judgment and notice of hearing thereon, order for summary judgment and the summary judgment entered in the trial court.

Examination of the foregoing discloses no basis for any of the grounds upon which Plaintiff in Error relies for reversal. The first point argued by its counsel is that,

> "The judgment relied upon to sustain the plea of *res judicata* was entered because of a technicality in the pleading, which did not go to the merits of the case."

Nothing in the clerk's record, which is all we can consider, throws any light upon the questions raised by that argument. To determine whether the doctrine of *res judicata* is applicable to this controversy would require a study of the reporter's transcript. There is no transcript before us in this case. In *Meagher et al.* vs. *Neal et al.*, 130 Colo. 7, 272 P. (2d) 992, it was held that, "Questions determinable only upon evidence introduced in the cause cannot be considered when the reporter's transcript has been stricken."

The second point argued by counsel for Plaintiff in Error is that, "None of the Defendants are properly in court. They are all in default." On December 15, 1955, we denied the motion of Plaintiff in Error, previously filed, in which it sought to strike the appearances of Defendants in Error and to enter a default against them. This question, therefore, has previously been decided in this cause. There is no rule of law which permits a party to relitigate an issue which has once been determined adversely to him.

The Writ of Error is dismissed.

MR. JUSTICE SUTTON not participating.

PETITION FOR RE-HEARING

Comes now the Plaintiff in Error and respectfully moves this court to grant a rehearing in this cause, for the following reasons:

I.

That the court, in its opinion, has omitted to take cognizance of the fact that this cause was pending before it on Plaintiff's in Error motion to strike the motion of Defendants in Error to dismiss.

On February 9, 1956, this court granted Plaintiff's in Error motion to delay the time in which to file its reply to the motion to dismiss, of the Defendants in Error, until this court passed on Plaintiff's in Error motion to strike the motion of Defendants in Error to dismiss the Writ of Error.

As the record stands, there is no motion to dismiss pending, but rather a motion to strike the motion to dismiss. By refusing to determine said motion to strike this court has denied Plaintiff in Error its day in court.

That, in and by entering an opinion on a matter not before it, it has changed the rule of law, as it is universally held, that the court must pass upon the questions presented for determination.

We respectfully submit that no citation of authority should be necessary in this fundamental precept. That, therein and thereby, this court has changed the rules of procedure and law, applicable to an orderly administration of justice, and denied the Plaintiff in Error due process of law and equal protection on the laws as granted by the United States Constitution.

Truax vs. *Corrigan*, 257 U. S. 312, 332.

American Ry. Express vs. *Comm. Ky.*, 273 U. S. 269.

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. . . . "Our whole system of law is predicated on the general, fundamental principle of equality or application of the law. "All men are equal before the law, . . . are all maxims showing the spirit in which . . . courts are expected to make, execute and apply laws."

Page 333. It sought an equality of treatment of all persons even though all enjoyed protection of due process.

Page 334. If, as asserted, the granting of equitable remedies falls within the police power and is a matter which the Legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids granting of equitable relief to one man and denying to another in like circumstances and in the same territorial jurisdiction . . . ; that they should have like access to the courts of the country, for the protection of person and property, the prevention and redress of wrongs and enforcement of contracts; that no impediment should be imposed to the pursuits of any one except as applied to the same pursuits to other under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . "

That therein and thereby, this court, has entered an arbitrary and capricious decision in conflict with the fundamental precepts protecting private rights, contrary to the due process clause of the United States Constitution.

II.

That this court, by its former decisions, held that it takes judicial notice of its former opinions and records, in *Rice* vs. *Bank,* 122 Colo. 244; 221 P. 2d., 378 and in *Drink-*

ard vs. *Spencer,* 72 Colo. 396, and in accordance with the great weight of authority that an appellate court takes judicial notice of its opinions and records.

> *Troxell* vs. *Del. Lack. & W. Ry.,* 227 U. S. 434, 435,
> "An appellate court takes notice of its own records so far as they pertain to a case under consideration. That court, therefore, would judicially know that the judgment appealed from was affirmed upon a former appeal, to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal."
>
> *Thornton* vs. *Webb,* 13 Minn., 498.
> *Butler* vs. *Eaton,* 141 U. S. 240.

Yet, by its decisions, in the instant case, it has changed the rule of the law, respecting its taking judicial notice of its former opinions and records, and has thereby denied Plaintiff in Error, its rights under Art. 2, Sec. 11 of the Constitution of Colorado and Art. 1, Sec. 9 thereof and the 14th Amendment of the United States Constitution.

> *Denver* vs. *Woodward,* 4 Colo. 162.
>
> *Colorado Springs* vs. *Neville,* 42 Colo. 219; 93 P. 1096.
>
> *Truax* vs. *Corrigan,* 257 U. S. 313, 332.
>
> *American Ry. Express* vs. *Comm. Ky.,* 273 U. S. 269.
>
> *Hooven & Allison* vs. *Evatt,* 324 U. S. 652, 659.
>
> "In all cases coming to us from state courts, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to re-examine for ourselves whether the asserted right or immunity is to be sustained."
>
> *Aspen Mining Co.* vs. *Billings,* 150 U. S. 31.

Craemer vs. *Wash.*, 168 U. S. 451.

In re Durant, 169 U. S. 39.

Dimmick vs. *Thompson*, 194 U. S. 540.

Conversely, in the instant case, this court was bound to take notice of the former action by these same parties; this court No. 17217, A. 48 Fo. 382, which conclusively shows that the former action was dismissed "without prejudice" and upon a technicality in pleading.

We respectfully refer to our argument under point 1-B, page 10, of our opening brief herein, rather than repeat it, and the statements on pages 1 and 2 of our "Brief in Support of Motion to Strike," wherein we brought out the point that the records of this court in the former case were to be considered in this case; that to hold otherwise would be a denial of the due process and equal protection clauses of the United States Constitution. However, this court did not pass upon that question in its opinion filed herein; it ignored it. That the Plaintiff in Error relied on the former opinions of this court concerning its taking judicial notice of its opinions and records.

III.

That this court, in its opinions in the cases of *Johnson* vs. *George*, 119 Colo. 153, 154, and *Mauldin* vs. *Lowery*, Colo. 255 P. 2d. 978, have formerly held that it will not entertain a motion to dismiss a Writ of Error where it is apparently filed properly. However, this court, by its present opinion, has overruled these former decisions and thereby changed the rule of the law and thereby denied to the Plaintiff in Error, herein, the equal protection and due process of law as guaranteed by the United States Constitution.

Tidal Oil vs. *Flanagan*, 263 U. S. 444, Fo. 177.

1-a

The District Court, in the instant case, entered an order August 15, 1955, (Fo. 174-177, R. 59), wherein at page 2, thereof, that court held:

> "It is further ordered that the pleadings, motions and orders in Case No. 31503 entitled Brennan Construction Co., etc. (Supreme Court No. 17217)—need not be duplicated as exhibits in the record on error in Case No. 32867, but may be referred to by reference to the record in Case No. 31503 (Supreme Court No. 17217)."

This order stands in the record; no objection was made thereto, and no point was made by either party to reverse or overrule the same; the same therefore was binding upon the state court which conclusively allows Plaintiff in Error to refer to the record on error in Case No. 31503 (Supreme Court No. 17217).

We respectfully submit that by ignoring this order, the state court has changed the universal rule of law and, therein and thereby, denied to Plaintiff in Error, equal protection and due process of law as granted by the United States Constitution.

Hooven & Allison vs. *Evatt,* 324 U. S. 652, 659.

CONCLUSION

We are impelled to call these errors to the court's attention because we feel it has overlooked the same and would wish to correct its opinion in conformance with the law by reason thereof.

Respectfully submitted,

John H. Gately
Attorney for Plaintiff in Error
519 North Tejon Street
Colorado Springs, Colorado

Monday, April Twenty-third, A. D. 1956

THE BRENNAN CONSTRUCTION COMPANY, INC., a corporation, *Plaintiff in Error,* vs. 17704 COLORADO SPRINGS COMPANY, a corporation, et al., *Defendants in Error.*	*Error to the District Court of El Paso County, State of Colorado.*

The court having considered the motion of the Plaintiff in Error for a rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

Appendix 4

EXCERPTS FROM SUPREME COURT OF COLORADO RECORDS, Cs. No. 17217. (R. 99).
A. 47, Fo. 381, THE COURT:

This matter comes on to be heard on the defenses set out by each of the defendants in this case which is that the Complaint does not state a claim upon which relief can be granted, which defense is in the nature of demurrer under the Code, and it is proper and should be disposed of before the trial of issues in the case.

The Court has now listened to about a day and a half of arguments which have been well presented by both sides, and is well advised on the question.

Without commenting further, the ruling of the Court will be that the first defenses of each of the defendants are well taken and that the Complaint does not state a claim upon which relief can be granted. The first defense of each of the defendants, which is in the nature of a motion to dismiss, will be sustained, and the plaintiff will be given fifteen days in which to file a Second Amended Complaint or stand on his Amended Complaint and if the Second Amended Complaint is not filed within fifteen days the case will be dismissed without prejudice.

MR. GATELY: I would like to save my exception.

THE COURT: Let the record show Mr. Gately saves his exception. Let the record show the trial order heretofore entered is vacated.

A.50 Fo. 401

REPORTER'S TRANSCRIPT

This matter came before the Court and Honorable John M. Meikle at two o'clock p. m. on the 10th day of August, 1953 at Colorado Springs, El Paso County, Colorado for further arguments upon the several motions of the defendants to dismiss for the reason that the complaint did not state a claim upon which relief could be granted; plaintiff appearing by John H. Gately, its attorney; and the various defendants appearing by their counsel of record.

Thereupon, the following proceedings, inter alai, were had:

THE COURT: You may proceed.

MR. GATELY: If Your Honor please, it was my impression that the defendants were going to argue in answer to our written brief.

THE COURT: No, it was continued in order that you might present some futher authorities and argument. . . . I don't know what is in your brief. I have never seen it. So, if you will read your brief to me . . .
402. (Arguments of counsel at length.)

THE COURT: This matter came on for hearing on July 16th upon the several motions of the defendants to dismiss for the reason that the complaint did not state a claim upon which relief could be granted; argument was heard at that time and the motion sustained and the plaintiff given time in which to file a Second Amended Complaint or elect to stand upon its first Amended Complaint. Subsequent to that, and before the time that the Court gave in which it might file a Second Amended Complaint, the Plaintiff came into court and asked to be heard further on the matter and to present further authorities and arguments.

403. I think counsel is in agreement on most of the principles discussed here. There is no question but what legal and equitable claims and defenses may be presented in the same suit—that the distinction, as far as procedure in pleading is concerned, has been abolished in this State—but the substative law remains the same. We still have suits in law and suits in equity. That can't be abolished and the Rules do not purport to abolish them.

This Complaint is drawn upon the agreement of the Colorado Springs Company to sell to the plaintiff one thousand lots or building sites for a price to be agreed upon, or agreed upon; that the plaintiff was to build houses on those lots and sell them. It was to take all of the profit that might be derived from the sale of houses and was to pay the purchase price for the lots. There was no sharing of profits or anything of the kind.

405. The Colorado Springs Company, according to the Complaint, agreed to wait for the payment of the purchase price until the houses were built and sold. The Colorado Springs Company further agreed to advance some twenty thousand dollars to enable plaintiff to go ahead and construct these houses. This seems to me to be clearly within the statute of frauds, and that is what I held at the last hearing.

406. The statute of frauds provides that such a contract is void. The statutes of England, as I recall from my law school days, provided that no action should be brought and while, of course, I haven't examined the statutes of the various states, some of the states doubtless have the same statute. Ours says it shall be void.

407. Our statute goes further, in Section 10, and provides how relief may be had in case of part performance—and that is that a court of equity may decree specific performance. The Rules can't change that. If you have a void contract under the statute of frauds and you want or are entitled to relief, you must go into a court of equity and

ask specific performance. It is true, that a court may give damages if the defendant can't specifically perform.

This is a case of conspiracy of certain parties alleged to have caused a breach of a void contract; in other words, sort of, or in the nature of a malicious interference with the contract—causing its breach.

409. There hasn't been anything shown to the Court this afternoon why the Court should change the ruling heretofore made—and the ruling heretofore made will stand, that the motions to dismiss be sustained.

C.R.S. 1953, Rule 12, (f).

MOTION TO STRIKE, upon a motion filed by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within twenty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent or scandalous matter stricken from any pleading. The objection that a responsive pleading or separate defense therein fails to state a legal defense, may be raised by motion filed under this subdivision. (Supplants part of Code Sec. 66, all of Sec. 78.)

Contracts for interests in land—must be written.

C.R.S. 1953, 59-1-10.

Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

Courts may enforce specific performance.

C.R.S. 1953, 59-1-8.

Nothing in this article shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreement.

FILED
SEP 26 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 305

THE BRENNAN CONSTRUCTION COMPANY, INC., a corporation, *Petitioner,*

vs.

COLORADO SPRINGS COMPANY, a corporation; J. FRED ABRAHAMSON and EDWARD O. ABRAHAMSON, individually and dba ABRAHAMSON BUILDING & SUPPLY CO. and dba A.B.C. HOMES; GEORGE H. KRAUSE; ALBERT B. LOGAN; ANTLERS HOTEL COMPANY, a corporation; THE RANSON-DAVIDSON COMPANY; S. H. RANSON, JR.; CLAUDE I. DEPEW; J. O. DAVISON; D. W. VINK; JOHN D. McCALL; HOBBY H. McCALL; WENDELL S. HOLMES, individually and as attorney-in-fact for John Denman, Jr.; DOROTHY J. KRAUSE; and Maurice Newton, Donald S. Stralem, Leonard D. Newborg, Frederick M. Peyser, Pierre Stralem, Hugo F. Van Stallie, Herbert R. Strauss, Fred M. Kauffman, A. B. Fletcher, and John Wallace as co-partners doing business under the name, style and description of HALLGARTEN & CO., attorneys-in-fact for Dorothy Palmer and Elsie Myers;

Respondents.

BRIEF IN OPPOSITION—REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

JAMES QUINE,

Counsel for Respondents J. Fred Abrahamson and Edward O. Abrahamson, individually and dba Abrahamson Building & Supply Co. and dba A.B.C. Homes.

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IN THE

Supreme Court of the United States

October Term, 1956.

No.————————

THE BRENNAN CONSTRUCTION COMPANY, INC., a corporation, *Petitioner,*

vs.

COLORADO SPRINGS COMPANY, a corporation, et al, *Respondents.*

BRIEF IN OPPOSITION—REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

To the Supreme Court of the United States:

In reply to Petitioner, it is admitted that the highest court of appellate jurisdiction in the State of Colorado is the Supreme Court of Colorado.

Reply to (1. a)

Respondents admit that the opinion of the Supreme Court of Colorado is not as yet reported.

(b)

Respondents deny that there are any grounds for jurisdiction and particularly deny the statement contained in the first paragraph on page 2 of Petitioner's Brief, wherein it is stated, "This judgment interposed to sustain the plea was rendered 'without prejudice,' on a technicality in pleading, contrary to all decisions of this court and other courts of this country," and that, "The Supreme Court of Colorado in affirming the dismissal of the lower court, in order to avoid the Federal question, based the

same upon a motion to dismiss the Writ of Error to which a motion to strike was filed by the Petitioner."

In the succeeding paragraph this Honorable Court should have its attention directed to the words, *"on its appeal to the state Supreme Court,"* various Federal questions were raised. These questions were raised only after Petitioner had lost his case in the Supreme Court of Colorado and not before.

Paragraphs 2 and 3 are not denied.

Reply to (3. c.)

QUESTIONS PRESENTED FOR REVIEW

These Respondents deny any questions are presented for review and inasmuch as Repondents' Brief will necessarily answer these questions later herein specific answer to the various points from 1. a.-g. will be omitted here.

(3. d)

CONSTITUTIONAL PROVISIONS, STATUTES

These Respondents deny that the provisions and statutes quoted under (3. d) of Petitioner's Brief are involved herein.

(3. e)
CONCISE STATEMENT OF THE CASE

These Respondents would like to make the following supplemental statement of the case.

As stated in the Petitioner's Brief, (Page 6, 3e, first paragraph), Petitioner first filed a lawsuit in the District Court of El Paso County, Colorado, for damages based on an oral contract for the sale of land. He sought therein to admit evidence of part performance in order to sustain his action for damages. The answers of Respondents denied the oral contract and invoked the Statue of Frauds. (Folios 52-123.) Many depositions were taken in the case, including the deposition of L. J. Brennan, the president of the plaintiff corporation. On motion to dismiss the Petitioner was given two weeks in which to amend his complaint and pray for specific performance and damages in the alternative. (Appendix Case No. 17217, Folio 381-2) He was told by said Court, evidently in order to permit him to dismiss the complaint which stated no cause of action under Colorado law and institute and re-file a valid complaint, that such first complaint would be dismissed "without prejudice." (Appendix 5, Petitioner's Brief, Page 32) However, the Petitioner did not accept the conditions of this order. Instead he appeared in Court after being given further argument on the matter at his request and stated he desired to stand on his complaint filed in the first action and desired the same dismissed. (Appendix Case No. 17217, Page A47, Folio 253) The action was thereupon dismissed and the judgment placed of record and said judgmment provides nothing concerning a dismissal "without prejudice." (Petitioner's Brief, Pages 33, 34 and 35, Folios 401-409) It is a straight judgment of dismissal and had Petitioner included this judgment in his brief, the reporter's transcript ordered by the defendants in error in the said District Court in the first action which

appears at Appendix 50, Case No. 17217, Folio 401, would not have been ordered by the Respondents herein. Thereafter the Supreme Court affirmed the judgment of the lower Court in connection with the first filed action (Supreme Court No. 17217).

The Petitioner then filed another complaint in the same District Court in and for El Paso County, Colorado, and the complaint was substantially the same as the complaint filed before except that a prayer for specific performance was added. (Petitioner's Brief, Page 7, Folio 1, R. 10) Your Respondents here then moved for summary judgment, said motion being chiefly based on *res judicata,* the election of remedies and estoppel. (Petitioner's Brief, Page 7, R. 25-52) More than fifty exhibits from the former case, Supreme Court No. 17217, were introduced in evidence as well as numerous depositions and other matters properly supporting said motion. The said District Court granted said motion. The Court made an order the substance of which was exactly as set forth in Petitioner's Brief to this Court at Page 30 thereof, paragraph 1-a. This order was apparently made so that the numerous exhibits properly belonging in the record of the Supreme Court of Colorado in case No. 17217 (the first case tried) could be returned to the Supreme Court files and said order in no manner brought these exhibits and records before the Supreme Court of Colorado in a proper manner in the second case (the present one) in connection with which the Petition for Writ of Certiorari is filed. In the first place the order referred to nothing except "pleadings, motions and orders" and did not mention a reporter's transcript.

After the motion for summary judgment was granted in the case now under consideration, when it was in said District Court, the Court granted the Petitioner sixty days from the date of the final judgment in which to prepare and lodge a reporter's transcript with the Supreme Court

of Colorado. (Petitioner's Brief, Page 8) This the Petitioner did not do. He also did not timely obtain an order from the trial Court to extend or enlarge the time in which to lodge said transcript. As will be shown herein, this is absolutely necessary under Colorado Rules of Civil Procedure.

It will be shown that even though Petitioner secured an order from the Supreme Court of Colorado extending the time in which to file his record on error, such an order would be granted on the assumption that he had complied with the Rules of Civil Procedure with respect to timely filing his reporter's transcript. This is clearly set forth in the case of Continental Air Lines, Inc., vs. the City and County of Denver, 226 P. 2nd 400, 129 Colo. 1, which case will be cited later under our argument.

Later, after the time for obtaining and docketing said reporter's transcript had expired, Petitioner secured an ex parte order from the trial Judge (of the District Court) permitting the transcript to be prepared and had the same certified by the trial Judge. Colorado Rules of Civil Procedure require that said reporter's transcript be lodged with the Clerk of the District Court and that the opposing parties shall have fourteen days in which to object to same. (C.R.S., 1953, R.C.P. Rule 112(f) When Petitioner's record was lodged these Respondents and other defendants in the case promptly objected to same. The objections were overruled and the matter proceeded to the Supreme Court of Colorado whre these Respondents and the other Respondents (in this case now before this Court) filed a motion to strike the reporter's transcript. These Respondents ordered a short reporter's transcript merely sufficient to set forth the judgment of the Court as is set forth on pages 33 and 34 of the Petitioner's Brief, Folio 401-409. These Respondents did not request, obtain or file a complete reporter's transcript as to do so might have cured the error made by Petitioner.

This motion to strike was heard, the Petitioner afforded every opportunity to resist same which was customary and he did file in this case, Supreme Court of Colorado No. 17704, a motion to strike these Respondents' appearances in said case and a reply to the motion of these Respondents to strike reporter's transcript and a brief in support of said motions and proof of service. These pleadings were served on these Respondents on the 17th day of October, 1955. The brief was quite full and complete including the citation of various authorities. The motion to strike the transcript was granted by the Supreme Court of Colorado. These Respondents then filed their motion to dismiss the Writ of Error and the Petitioner filed a motion to strike this motion to dismiss. Again the Petitioner in this case before the Supreme Court of Colorado filed a reply brief in which he at length argued that his motion to strike the motion to dismiss the Writ of Error should be sustained. These briefs which afforded the Petitioner to contest every step of the proceedings are apparently not included in his designation of the record to be certified from the Supreme Court of Colorado to this Honorable Court. Thereafter the Supreme Court dismissed the Writ of Error and the Petitioner then filed his petition for rehearing in which for the first time that these Respondents have been able to discover the "Federal Questions" so often mentioned in Petitioner's Petition for Certiorari are brought to light. The Petitioner then waited until the proper time had expired for bringing this matter to this Honorable Court on Petition for Certiorari and this Court granted him the right to petition for same nevertheless. There was no objection by these particular Respondents.

(3. h.)

REPLY TO CONTENTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. There is no United States Constitutional question involved nor are any Federal rights involved.

(a) The Petitioner states, "The Supreme Court of Colorado had pending before it a motion to strike the motion to dismiss, filed by the Respondents herein. At the filing thereof, that court granted to the Petitioner an extention of time in which to file its reply to the motion to dismiss, until that court passed on the motion to strike. (Appendix 1.)" This is true, however, the common interpretation of such permission would not be that the Supreme Court of Colorado thereby *guaranteed* that the motion to dismiss the Writ of Error would not be granted. It was the first motion filed and the one that should have been determined first. This extension of time did nothing more than assure the Petitioner that he would not be held in default with respect to *time only* in the filing of his answer later *if an answer was required.* Were it otherwise, the Supreme Court of Colorado would be guaranteeing to the Petitioner without ever hearing the first motion filed that the motion to dismiss was invalid.

The Petitioner aptly states on Page 12 of his Brief, second paragraph thereof, that he is unable to find a case "where a court has had a matter pending before it and deliberately avoided it and decided another question not then in issue." The Petitioner evidently is referring to the fact that after these Respondents had filed a motion to strike the transcript of record in the Supreme Court of Colorado and he had had his hearing thereon and had lost and after these Respondents took the next step which would logically follow, to-wit: the step of filing a motion to dismiss the Writ of Error, the Petitioner then in a vain effort

to avoid the doom which was approaching and in an effort to avoid a hearing on the next logical motion, that is, the motion to dismiss the Writ of Error, then filed a motion to strike the motion to dismiss the Writ of Error. This he filed notwithstanding he had already had his day in Court on his brief as set forth in our statement of the case as to why the motion to dismiss the Writ of Error should not be granted. It is humbly suggested that the motion to strike was nothing more than a second attempt to resist again the motion to dismiss the Writ of Error and the motion to dismiss the reporter's transcript upon which he had already been heard.

Even if Petitioner had not been heard on the motion to dismiss the Writ of Error, his motion to strike the same amounted to a contest of the motion to dismiss the Writ of Error in all particulars. Even if this premise is not true, the motion had no place because it was a motion to a motion and were the Courts to permit this, litigation could proceed forever with each party simply filing a motion to the other party's motion. The Petitioner gives no proper grounds as to any right under Colorado procedure to file a motion to strike to a motion already filed by an adverse party. On page 36 of Petitioner's Brief he sets forth Rule 12 (f) Colorado Revised Statutes, wherein the proper role of a motion to strike is set forth. This rule provides nothing more than that a motion to strike may be used to rid the pleadings of any redundant, immaterial, impertinent or scandalous matter. This is the only purpose of the rule. No claim is or was made that these Respondents' motion to dismiss the Writ of Error was scandalous, redundant, immaterial, or otherwise subject to Rule 12 (f) as set forth. The motion to strike joined every issue set forth in our motion to dismiss. It did not ask any part of the motion to dismiss to be stricken, but set forth opposing legal arguments to those contained in the motion to dismiss and prayed that the entire motion be stricken.

What the Petitioner apparently is really complaining of with regard to these motions is simply that he was permitted to file a brief on his motion to strike these Respondents' motion to dismiss the Writ of Error and contest said motion to dismiss the said Writ of Error in this manner. It was his own method of procedure, he had the opportunity to file the matter either way he chose and he selected the second method, was defeated on the same and then he complained because he was not allowed to re-litigate the identical issue by being permitted to file another reply brief to the first motion filed, which was the motion of these Respondents to dismiss the Writ of Error. These Respondents did not prevent him from filing anything he chose or arguing anything any way he chose nor did the Supreme Court of Colorado. When the motion to strike the reporter's transcript had been heard it was a foregone conclusion that his Writ of Error could not prevail as he then had no record before the Court to know whether or not the plea of *res judicata* sustained in the lower Court should be set aside or that the lower Court had committed any error with respect thereto.

(b) The Supreme Court of Colorado did not arbitrarily refuse to follow the order of the lower Court in permitting referral to its records in the previous case. Hereunder need only be cited the first quotation set forth on page 13 of the Petitioner's Brief. No mention of a reporter's transcript is contained in said order. It might also be suggested that even if said order could be construed in any possible manner to include a reporter's transcript or permit referral to the previous case it was the Petitioner's duty to direct the attention of the Supreme Court to the portions of the said previous record (in the case tried first in the lower Court) and was not the duty of the Supreme Court of Colorado to help prepare Petitioner's case.

In 20 Am. Jur., Evidence, Section 87, Page 105, we find the following statement:

> "IN OTHER CASES.—In the trial of a case before it, a court ordinarily will not, upon either its own motion or suggestion of counsel, take judicial notice of the records, judgments, and orders in other and different cases or proceedings, even though such cases or proceedings may be between the same parties and in relation to the same subject matter. In other words, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration by the formal introduction of such records into evidence. Thus, two suits for the same cause of action may be pending in the same court between the same parties, but the fact will never claim judicial attention until the pendency of one suit has been pleaded in abatement of the other. Similarly, an appellate court has no knowledge of the record of another case pending before it, even though it is between the same parties. But it will take notice of its records to the extent of knowing that the controvery involved in an appeal has already been considered by it on a previous occasion or that a judgment vital to the present action has been reversed by it on appeal. Thus, an appellate court, in considering an appeal by a garnishee, will judicially notice the fact that its record show that it has previously reversed the judgment, in the principal action, upon which the garnishment is based. It should be noted in this connection, however, that the rule which precludes a court from taking judicial notice of its own records in other actions does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principle under the theory of stare decisis in the second action."

This principle has been affirmed in the case of Fryer vs. Breeze, 26 P. 817, 16 Colo. 323, and also in Downing vs. Howlett, 40 P. 505, 6 Colo. Appeals 291 (these cases are old cases before the new Rules of Civil Procedure in Colorado were adopted and the reporter's transcript was then

referred to as bill of exceptions). There are various Colorado cases holding that the Supreme Court could judicially notice its former opinion, Hughes vs. Jones, 3 P. 2d, 1074, 89 Colo. 455, and all the pleadings filed in a cause, Ady & Crowe Mercantile Co. vs. Howard, 176 P. 328, 65 Colo. 272. The date of the institution of a suit, U. S. Fidelity and Guaranty Co. vs. Newton, 115 P. 897, and matters of this nature, however, in general Colorado follows the rule quoted in Am. Jur. *supra*. Ginsberg vs. Thomas, 170 F. 2d, 1, a late Federal case originating in Colorado, holds that a Court takes judicial notice of its own records but the one who relies on preceding records must call them to the Court's attention. Here it must be borne in mind that the Petitioner before the Supreme Court of Colorado is not asking the Court to merely judicially notice its former judgments, decrees or matters stated in its opinion or former adjudications or even just the "record". The Petitioner is claiming the Court should go further than noticing the pleadings, former opinions of the Court or facts stated therein and should judicially notice the evidence in a preceding case without Petitioner having properly brought that evidence before the Court by a reporter's transcript as required by our Colorado Revised Statutes 1953 and Rules of Civil Procedure and without having even directed attention to the same until he has lodged his case in the Supreme Court of Colorado without directing the Court's attention to same or properly having brought the same before the Court. Under the Colorado Revised Statutes 1953, Rules of Civil Procedure, Rules 111 (c), 112 (a), (b) and 6 (b) must be complied with in order for the reporter's transcript to become a part of the record on error.

Rules 111 (c) provides:

> "and the party seeking the writ of error shall do any and all things necessary under Rule 112 to obtain such record on error."

The record on error consists of (1) copy of the designated pleadings from the trial court certified by the clerk, (2) the reporter's transcript.

Rules 112 (a) provides:

> "The party who seeks to reverse a judgment shall file promptly with the clerk of the trial court a designation indicating the parts of the record, proceedings and evidence to be certified to the Supreme Court."

Rules 112 (b) provides:

> "The party seeking reversal shall within 60 days from the date of the judgment sought to be reviewed, lodge with the clerk of the trial court the reporter's transcript containing such parts of the proceedings and evidences as may have been designated."

No designation of the record on error was filed in the trial court until April 29, 1955, (Colorado Supreme Court No. 17704, Folio 161) which was 59 days after judgment and one day before the expiration of the 60 day period for lodging the reporter's transcript in the trial court.

The motion of the Respondents to strike the reporter's transcript and the court records upon which it is based affirmatively show that the reporter's transcript was not lodged with the clerk of the trial court until August 24, 1955 or 176 days after the date of the judgment sought to be reviewed.

The case of Fraka et al, vs. Malarnee, 267 P. 2d 651 129 Colo. 87, at page 90 states:

> "Because the writ of error in the instant cause must be dismissed, and for the reason that there seems to be a growing tendency among members of the bar to believe that briefs can be filed whenever it is convenient, and that the Rules of Civil Procedure relating to proceedings before this court can be ignored or violated without serious consequences, we feel compelled to say that failure to follow the established rules of appellate practice may be fatal to a cause. Our court

intends to enforce the Rules of Civil Procedure, and we solicit the co-operation of members of the bar, with the firm belief that they will approve an orderly procedure in appellate practice which can only be brought about by the observance of the rules which must govern that practice."

2. The orders of the Supreme Court based upon the motions of plaintiff in error filed July 14, 1955 and August 22, 1955 for extensions to file the record protected the plaintiff in error only on the running of the time within which to file its record with the Clerk of the Supreme Court and not the running of the time within which to lodge the reporter's transcript with the clerk of the trial court.

In Colorado we have what is known as the clerk's record and the reporter's transcript, or record of the testimony outside of the pleadings, and the Supreme Court of Colorado has repeatedly held that questions determinable only on evidence introduced in the cause cannot be considered on appeal when the reporter's transcript has been stricken.

Meagher, et al vs. Neal, et al. 272 P. 2d 992, 130 Colo. 7.

Sholes vs. Norris. 63 P. 124, 15 Colo. Appeals 475.

Most Worshipful Prince Hall Grand Lodge A. F. and A. M. of Colorado and Jurisdiction vs. Most Worshipful Hiram Grand Lodge. 282 P. 193, 86 Colo. 330.

Continental Air Lines, Inc. vs. City and County of Denver. 266 P. 400, 129 Colo. 1.

Neither was the Petitioner's first action in the lower court (17217) dismissed "without prejudice" on a technicality in the pleading. This has been covered in the statement of the case, but repeating the same briefly, the Petitioner filed an action for damages on an oral contract. Under Colorado Statutes such a contract is void if it is

not in writing. (C.R.S. 1953, 59-1-10, Petitioner's Brief, Page 36) The Respondents plead the Statute of Frauds (Folios 52-123). Petitioner invoked the doctrine of part performance to sustain an action for damages. The lower Court allowed him two week in which to amend his complaint in accordance with Colorado Statutes where equity is sought. (Appendix Case No. 17217, Folios 381-2 and Appendix 5 at Page 32, of Petitioner's Brief) Petitioner appeared before the two weeks period had expired and elected to stand on his complaint and refused to amend. (Appendix Case No. 17217, Page A47, Folio 253) The Court then dismissed the action and dis not dismiss "without prejudice." (Petitioner's Brief, Pages 33, 34 and 35, Folios 401-409) The Petitioner then appealed the action to the Supreme Court of Colorado, which Court affirmed the said lower Court's decision. The Petitioner then refiled this present action and attempted to go back over the bridge he had burned by filing the action over again after he had elected to stand and disregard his opportunity to timely amend. These Respondents respectfully submit that points 3c, 3d and 3e are nothing more than a repetition of the points already set forth by Petitioner and replied to herein by these Respondents.

CONCLUSION

The decision of the Supreme Court of Colorado in this case did not deny the Petitioner his day in Court or any rights under our Federal Constitution. The Supreme Court of Colorado followed in determining this controversy the same precepts of law it has followed with respect to all others who have come before it. The Petitioner received a fair and impartial trial and has litigated the same cause twice through the Supreme Court of Colorado and now seeks to relitigate it in the United States Supreme Court. Under the rules of this Honorable Court and especially under Rule 19 thereof, the burden of establishing special and important reasons for the granting of this

Petition for Writ of Certiorari rests squarely on the Petitioner. He must show that a Federal question is involved. He has shown none. He has brought before this Honorable Court simply the naked motions and pleadings without the necessary reporter's transcript and other evidence which would be necessary even if some Federal right had been involved. For example, he claims he did not have the opportunity to answer the motion to dismiss the Writ of Error, whereas actually he filed a brief contesting the same under his motion to strike. He had also filed a brief to contest the motion to strike reporter's transcript. He has brought none of this before this Honorable Court. It is believed that at this stage of the proceedings the burden of proof is on the Petitioner to show all these matters and things which support his request for this Honorable Court to take jurisdiction of this controversy and it is humbly suggested that he has failed to show that this Honorable Court should take jurisdiction of this cause and that the Petition for the Writ of Certiorari to the Supreme Court of Colorado should be denied.

Respectfully submitted,

JAMES QUINE,

Counsel for Respondents, J. Fred Abrahamson, Edward O. Abrahamson, individually and dba Abrahamson Building & Supply Co., and dba A.B.C. Homes.

OCT 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 305

THE BRENNAN CONSTRUCTION COMPANY, INC.,
a Corporation, *Petitioner*,

vs.

COLORADO SPRINGS COMPANY,
a Corporation, et al., *Respondents*.

Brief For Respondents in Opposition

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In The

Supreme Court of the United States

October Term 1956

No. 305

The Brennan Construction Company, Inc.,
a Corporation, *Petitioner,*

vs.

Colorado Springs Company,
a Corporation, et al., *Respondents.*

Brief For Respondents in Opposition

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported at 295 P. 2d 686 and is printed at pages 24-25 of petitioner's appendix.

JURISDICTION

The decision of the Supreme Court of Colorado was rendered on March 12, 1956, and a petition for rehearing was denied on April 23, 1956. The time within which to file a petition for writ of certiorari was extended to August 13, 1956. The time within which to file a brief for respondents in opposition was extended to October 5, 1956. The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether this Court should review on certiorari a judgment of the Supreme Court of Colorado which dismissed petitioner's case as a result of petitioner's failure to comply with the Colorado Rules of Civil Procedure.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States:

"Amendment 14: ***nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colorado Rules of Civil Procedure (Revised Statutes, 1953):

"Rule 41. Dismissal of Actions.

* * * * * * * * * * * *

"(b) Involuntary Dismissal.

"(1) By Defendant. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under rule 3, operates as an adjudication upon the merits."

"Rule 111. Writ of Error.

* * * * * * * * * * * *

"(c) How obtained. To obtain a writ of error a party, within the time fixed by this rule, shall docket the case in the supreme court either by filing the record on error prepared in compliance with rule 112 or by filing a praecipe for a writ of error. There shall be filed at the time of such docketing a designation of the parties which lists the names of the plaintiffs in error and of the defendants in error. Where the record is not filed at the time of the docketing, the clerk of the supreme court shall issue and transmit to the clerk of the trial court a writ of error commanding that the record on error shall be certified to the supreme court within sixty days from the receipt of such writ or within such other or additional time as the supreme court may order and the party

seeking the writ of error shall do any and all things necessary under rule 112 to obtain such record on error. * * *"

"Rule 112. Record on Error.

* * * * * * * * * * * *

"(f) Transcript; Objections; Certification. The party seeking reversal shall, within 60 days from the date of the judgment sought to be reviewed, lodge with the clerk of the trial court the reporter's transcript containing such parts of the proceedings and evidence as may have been designated. * * *"

STATEMENT

This litigation involves two actions brought by petitioner:

(1) A complaint and an amended complaint founded on an alleged oral contract to convey land, filed in a Colorado District Court and dismissed by that court on the ground that the complaint as amended did not state facts justifying relief, the statute of frauds having been pleaded. On appeal the Colorado Supreme Court affirmed.

(2) The present complaint in the same District Court alleging the same contract and requesting equitable relief, which the District Court dismissed, substaining a plea of *res judicata*. On appeal the Colorado Supreme Court dismissed the writ of error. The present petition seeks review of this latter dismissal.

The details stated below show that the petitioner failed to comply with the Colorado Rules of Civil Procedure, so that a part of the record on the second appeal, essential to the review sought, was filed too late, and the Colorado Supreme Court dismissed the appeal because the record which was properly before it was lacking in the materials necessary to decide whether or not the judgment of the court below was correct.

A complaint was filed in 1953 by petitioner in the District Court of El Paso County, Colorado, to recover damages for breach of an oral contract for the conveyance of real estate that allegedly had been entered into by respondents.

The complaint was amended and respondents answered, pleading among other defenses that the amended complaint failed to state a claim upon which relief could be granted in that the alleged contract was void under the statute of frauds. (R. 99, A1, A24.)[1] Respondents moved to dismiss the amended complaint. (R. 99, A50-51.)

After hearing argument of both counsel on the sufficiency of the amended complaint on July 16-17, 1953, Judge Meikle stated that the defense, which was in the nature of a demurrer under the Colorado Code, was sustained, and that "the plaintiff will be given fifteen days in which to file a Second Amended Complaint or stand on his Amended Complaint and if the Second Amended Complaint is not filed within fifteen days the case will be dismissed without prejudice." (R. 99, A48.) An order was entered on July 17, 1953, sustaining the defense that the amended complaint did not state a claim on which relief could be granted. (R. 99, A45.) The order made no reference to dismissal but allowed petitioner until August 15, 1953, within which to file a second amended complaint. On motion of petitioner, the District Court permitted further argument on the motion to dismiss on August 10, at the conclusion of which it affirmed its ruling of July 17. (R. 99, A50-A53.)

On August 11, 1953, the court entered its order of dismissal, which provided (R. 99, A46-A47):

> "And thereupon comes on for hearing to the Court Plaintiff's Motion to present further argument. Further argument is presented, and the Court being sufficiently advised in the premises doth order that the order heretofore entered in this cause should stand, and the former ruling of the Court is affirmed.
>
> "BE IT REMEMBERED, That thereafter and on the 11th day of August, A.D. 1953, the same being one of the regular juridical days of the May, A.D. 1953

[1] Reference to the unprinted Transcript of Record certified by Colorado Supreme Court is indicated by "R. ." Reference to the Appendix on page 99 of that Transcript is indicated by "R. 99, A ." Reference to the Supplemental Transcript of Record is indicated by "S.R. ."

term of said District Court, the following proceedings, inter alia, were had and done, to-wit.

"Plaintiff, by its attorney John H. Gately, Esq., appears in open court and states he does not care to file a Second Amended Complaint, and requests the Court that said action be dismissed now rather than wait until August 15th.

"IT IS THEREFORE ORDERED by the Court that this action be, and the same hereby is, dismissed."

No objection was made to the form of this order.

Rule 41(b)(1) of the Colorado Rules of Civil Procedure provides:

"(b) Involuntary Dismissal.

"(1) By Defendant. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under rule 3, operates as an adjudication upon the merits."

The petitioner appealed this order of dismissal to the Supreme Court of Colorado. Briefs were filed by both parties and the court heard oral arguments. Thereafter it affirmed by per curiam order the decision of the District Court dismissing the amended complaint. 129 Colo. 499, 271 P. 2d 1051.

The petitioner then filed the present complaint in the same District Court, setting out the same facts as set out in the former action and requesting equitable relief. (R. 10.) The respondents answered and among other defenses pleaded *res judicata*. (R. 25, 33, 41.) The respondents filed a motion for summary judgment and upon trial introduced the judgment roll of the former case. (R. 49.)

After hearing argument from both counsel, Judge Meikle granted the motion on the ground that the cause of action was barred by *res judicata*, and dismissed the complaint. (R. 54-57.) This judgment became final on March 1, 1955. (R. 57-58.) The Supreme Court of Colorado issued a writ of error on May 27, 1955. (R. 2.)

Rule 112(f) of the Colorado Rules of Civil Procedure

requires the appealing party to lodge the reporter's transcript with the District Court within 60 days from the date of the judgment. Rule 111(c) of the Colorado Rules requires that the record on error be certified to the Colorado Supreme Court by the District Court within 60 days from the receipt of the writ of error by the Clerk of the District Court.

The record in this case discloses that the petitioner twice moved for an extension of time within which to file the record on error in the Colorado Supreme Court and that court granted the motion in both instances, the second extension running to September 26, 1955. (R. 4-7.) The record discloses no request by petitioner and no order by either the District Court or the Colorado Supreme Court to extend the time for lodging the reporter's transcript with the District Court. The petitioner lodged the reporter's transcript on August 24, 1955, 176 days after the decision of the District Court. (R. 64-65.) The respondents filed a timely objection in the District Court on the ground that the reporter's transcript was not lodged within the sixty-day period as required by the rules. The objection was overruled by the District Court on September 21, 1955, and the record was certified to the Supreme Court of Colorado. (R. 70-71.)

The respondents then filed a motion and a supporting brief in the Supreme Court of Colorado to strike the reporter's transcript from the record because it had not been timely lodged with the District Court. (R. 72.) The petitioner filed an answer to this motion, with a brief in support. (R. 77-79.) The Supreme Court of Colorado granted respondents' motion, and the reporter's transcript, which included the judgment roll in the former action, was ordered stricken on December 15, 1955. (R. 79.) This left before the Colorado Supreme Court only the clerk's record, which consisted of the pleadings and orders of the District Court in the present case.

The petitioner filed its opening brief on January 13,

1956, wherein it argued that the former case had been dismissed without prejudice and on a technicality in pleading and that the plea of *res judicata* could not be sustained. (S.R. 1-20.)[2]

On January 26, 1956, the respondents filed a motion to dismiss the writ of error on the ground that the petitioner in its opening brief relied only on grounds ascertainable from the reporter's transcript which had been stricken, and therefore the record properly before the court did not contain the materials necessary for a review of the *res judicata* question. (R. 80.) Respondents filed a brief in support. (S.R. 20-26.)

On February 2, 1956, the petitioner moved to strike respondents' motion to dismiss, with a brief in support, wherein it was argued that respondents' motion to dismiss the writ of error was improper procedure, and that the reporter's transcript was not needed for reversal of the lower court because the Colorado Supreme Court should take judicial notice of the record in the former case. (R. 85.) The petitioner also argued that the Colorado Supreme Court could consider the record in the former case since the order of the District Court allowing reference to the record of the former proceedings had not been stricken. (S.R. 29-33.)

On February 7, 1956, the respondents filed an answer brief to the petitioner's motion to strike its motion to dismiss, wherein it was argued that the motion to strike was improper procedure and that the case should be considered to be before the court only on respondents' motion to dismiss. The respondents reiterated their argument that the determination of the issue of *res judicata* depended entirely on the judgment roll of the former case. Since this judgment roll was a part of the reporter's transcript which had been stricken, the Court was left with no basis for

[2] It is deemed appropriate to include in the record some of the briefs in the Supreme Court of Colorado because of petitioner's assertion that it was not given an opportunity to be heard.

reversal. The respondents further argued on the merits that the case was dismissed with prejudice, based on Rule 41(b) of the Rules of Civil Procedure. (S.R. 34-41.)

On February 9, 1956, the Colorado Supreme Court granted the petitioner additional time for filing an answer brief to respondents' motion to dismiss until a ruling on the motion to strike the motion to dismiss. (R. 86.) On February 14, 1956, the petitioner filed a reply brief on its motion to strike respondents' motion to dismiss, wherein it was argued that a motion to strike a motion to dismiss was proper procedure, and that the complaint in the former case had been dismissed without prejudice. The petitioner reiterated its argument on judicial notice. (S.R. 42-47.)

The Supreme Court of Colorado on March 12, 1956, dismissed the writ of error. (R. 90.) The court considered that the case was before it on respondents' motion to dismiss, and decided that "to determine whether the doctrine of res judicata is applicable to this controversy would require a study of the reporter's transcript." (R. 89.) Since the reporter's transcript had been stricken, the court held that the only matters that it could consider were those in the clerk's record which afforded no basis for reversal. A petition for rehearing was denied on April 23, 1956. (R. 97-98.)

REASONS FOR DENYING THE WRIT

The Supreme Court of Colorado in affirming the judgment of the lower court did not decide a Federal question of substance. It was not necessary to decide such a question, because the court found that the petitioner had not complied with the Rules of Civil Procedure and that the writ of error should be dismissed. The petitioner therefore has no sound ground for asking this Court to review the action of the Colorado Supreme Court.

The petitioner was afforded its day in court in both actions and has thus had the due process of law required by the Fourteenth Amendment. Moreover, the Colorado

Rules of Civil Procedure, which are not challenged by the petitioner, were applied to petitioner just as they have been applied to others under similar circumstances. Thus petitioner has been afforded the equal protection of the laws.

1. It is apparent from its opinion that the Supreme Court of Colorado did not decide any Federal question. Upon respondents' motion, the court had stricken the reporter's transcript from the record on error for failure to comply with the Colorado Rules of Civil Procedure. After the reporter's transcript had been stricken, the only question before the Colorado Supreme Court was whether the clerk's record in the present case afforded a basis for reversal of the lower court or whether the court should, in its discretion, take judicial notice of the record in the former proceeding. The court held that the only matters properly before it were those disclosed in the clerk's record, which did not afford a basis for reversal. It therefore dismissed the writ of error.

Since there was no decision on a Federal question and none was necessary for disposition of the case, the writ should be denied. *Johnston* v. *Risk*, 137 U. S. 300; *Leathe* v. *Thomas*, 207 U. S. 93; *Twining* v. *New Jersey*, 211 U. S. 78, 106-7. As this Court stated in *McCoy* v. *Shaw*, 277 U. S. 302, 303:

> "It is settled law that a judgment of a state court which is put upon a non-Federal ground, independent of the Federal question involved and broad enough to sustain the judgment, cannot be reviewed by this court, unless the non-Federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the Federal question."

2. The petitioner asserts that the action of the Colorado Supreme Court was arbitrary and amounted to a denial of due process and equal protection of the laws.

Law, in its regular course of administration through courts of justice, is due process. *Caldwell* v. *Texas*, 137

U. S. 692, 697; *Twining* v. *New Jersey, supra,* at page 111. A comprehensive discussion of due process as it applies in state judicial proceedings is found in *Twining* v. *New Jersey, supra.* The Court stated that the due process clause requires only that the state court have jurisdiction and give notice and an opportunity for hearing to the parties, and—

> "* * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

In *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, this Court stated:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some prinicple of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The fact that a decision of a state court is incorrect or results in overruling prior decisions does not deprive the litigant of due process of law or the equal protection of the laws. *Central Land Company* v. *Laidley,* 159 U. S. 103, 112; *Patterson* v. *Colorado Ex Rel. Atty. Gen.,* 205 U. S. 454, 461; *Delmar Jockey Club* v. *Missouri Ex Rel. Atty. Gen.,* 210 U. S. 325, 335; *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 59-60; *Tidal Oil Company et al.* v. *Flanagan,* 263 U. S. 444, 450; *Neblett et al.* v. *Carpenter et al.,* 305 U. S. 297, 302; *Gryger* v. *Burke,* 334 U. S. 728, 731; *Stein et al.* v. *New York,* 346 U. S. 156, 181.

It is also settled that in determining whether notice and opportunity to be heard have been accorded the litigant the court concerns itself only with the substance of the

proceedings and not with the form. *Simon* v. *Craft*, 182 U. S. 427; *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261.

When these general principles are applied to the facts here it becomes apparent that petitioner has been accorded due process of law. The petitioner does not challenge the jurisdiction of the Colorado courts—it complains only that it was denied its day in court.

The petitioner was heard in the District Court in the ordinary course of judicial proceedings. It had also been heard when the first case was before the District Court. The court then had pointed out certain defects in the complaint and suggested an amendment, but the petitioner elected to stand on its complaint. The petitioner had its day in the District Court.

Although the statutes of Colorado granted the right of appeal from the decision of the District Court, it is clear that the right of appeal is not a requirement of due process. *National Union of Marine Cooks* v. *Arnold*, 348 U. S. 37, 43, and the cases there cited. However, since the statute provided for an appeal, it would seem appropriate for the parties to be given due process in the Colorado Supreme Court. Cf. *Cole* v. *Arkansas*, 333 U. S. 196.

In appealing the case to the Supreme Court of Colorado, the petitioner failed to follow the Colorado Rules of Civil Procedure regarding the reporter's transcript and as a consequence it failed to have any of the Record of the District Court, except for the clerk's record, properly before the Supreme Court for review. The Colorado Supreme Court held that the reporter's transcript, which contained the judgment roll of the former proceedings, was necessary for it to decide the question of *res judicata*.

The petitioner was heard by the Colorado Supreme Court on the merits of its case through its opening brief. It argued the question whether the judgment relied on as a bar was entered "without prejudice", and it also argued

that the plea of *res judicata* could not be relied upon by respondents "because it was entered by reason of a technicality in pleading, which did not go to the merits."

The petitioner also had an opportunity to answer directly the respondents' motion to dismiss, but it chose instead to file a motion to strike that motion. The petitioner's briefs in support of its motion to strike presented substantially the same arguments that would have been presented had petitioner directly answered the motion to dismiss. Under these circumstances, where the petitioner had apprised the Court of its arguments on the motion and on the merits, the Court did not deprive petitioner of a fundamental right by deciding the motion without allowing the petitioner to file another brief on the same subject. Thus, the petitioner was heard in the Supreme Court of Colorado on all the procedural and substantive points that it raises in this Court. The Supreme Court of Colorado disposed of the case on the procedural points and did not reach the substantive questions.

The petitioner was heard in the District Court, and the Supreme Court of Colorado had before it six briefs of the petitioner, including its brief on the merits. The requirements of due process were met by both courts.

3. The petitioner's assertion that it has been deprived of the equal protection of the laws of Colorado is completely answered by the fact that there is no showing that anyone comparably situated has been treated differently from petitioner. *National Union of Marine Cooks* v. *Arnold*, *supra* at page 41. To the contrary, the rule applied in this case has been applied uniformly to other litigants in the Colorado courts.

In *Continental Air Lines, Inc.* v. *Denver*, 129 Colo. 1, 266 P. 2d 400 (1954), the plaintiff had secured extensions of time for filing the record on error in the Colorado Supreme Court. It had not secured an extension of time within which to lodge the reporter's transcript with the

District Court. The plaintiff, however, attempted to rely on material in the reporter's transcript. In dismissing the writ of error, the Supreme Court of Colorado stated (p. 7):

> "The attempt of counsel for plaintiff to place reliance upon extensions received from this Court within which to file the record on error with the clerk of our Court, can be of no avail. We have searched our files covering this entire proceeding and we find that in each instance this Court was petitioned for an extension of time within which to *file the record on error.* We never were asked for an extension of time in which to lodge the reporter's transcript with the clerk of the trial court. * * *
>
> "* * * Within recent months several instances similar to the one now under consideration have occurred, and we have consistenly ordered the transcript stricken. This is in keeping with our policy and practice prevailing before adoption of our present rules."

The situation with respect to compliance with the Rules of Civil Procedure led the Colorado Supreme Court, in *Fraka* v. *Malernee*, 129 Colo. 87, 267 P. 2d 651 (1954), to serve the following warning on litigants and their attorneys (p. 90):

> "Because the writ of error in the instant cause must be dismissed, and for the reason that there seems to be a growing tendency among members of the bar to believe that briefs can be filed whenever it is convenient, and that the Rules of Civil Procedure relating to proceedings before this Court can be ignored or violated without serious consequences, we feel compelled to say that failure to follow the established rules of appellate practice may be fatal to a cause. Our Court intends to enforce the Rules of Civil Procedure, and we solicit the cooperation of members of the bar, with the firm belief that they will approve an orderly procedure in appellate practice which can only be brought about by the observance of the rules which must govern that practice."

As the Colorado Supreme Court pointed out in *Smith* v. *Woodall,* 129 Colo. 435, 270 P. 2d 746 (1954), p. 439:

> "Under rule 6(b) (1), R.C.P. Colo., enlargements of time are so readily obtainable where application is made therefor within apt time that there is rarely an occasion where failure to do so would appear to be excusable. Compliance with the rules in the preparation, certification and lodging of the reporter's transcript is imperative if it is desired to make it a part of the record on error. * * *"

The rule regarding the lodging of the reporter's transcript as applied in the instant case and in *Continental Air Lines* was applied in the same way in *Bonham* v. *Aurora,* ..... Colo. ....., 294 P. 2d 267 (1956); *Ratliff* v. *Davis,* ..... Colo. ....., 294 P. 2d 1109 (1956); *Smith* v. *Woodall,* 129 Colo. 435, 270 P. 2d 746 (1954); and in other cases cited in the *Continental Air Lines* opinion.

Thus the petitioner was not denied the equal protection of the laws.

4. The petitioner also complains that it was denied due process and equal protection of the laws because the Supreme Court of Colorado failed to give effect to the permission granted by the lower court to refer to the record in the former case without duplicating it in the record in this case, and because it failed to take judicial notice of the proceedings in the former case.

Whether or not judicial notice should be taken of the record in a former proceeding is a matter which the Supreme Court of Colorado was competent to decide. Moreover, since the matter of the former record was in dispute, and had been introduced in the present record and stricken by the Supreme Court because the petitioner failed to comply with the rules, the court properly refused to take judicial notice of it.

Also, it is apparent that the order of the District Court allowing reference to the former record for purposes of saving duplication in the reporter's transcript, which would have been part of the record on error if it had been timely lodged

with the trial court, ceased to have any force when the reporter's transcript was stricken, and therefore the court properly refused to consider the former record to be before it.

The petitioner argues, however, that had the Colorado Supreme Court taken judicial notice of the former record, it would have discovered that the former case was dismissed "without prejudice" and that the respondents' plea of *res judicata* could therefore not be sustained. This argument is wholly unwarranted. Reference to the former record would show that the remarks by the District Court at a hearing almost a month before the entry of the final order of dismissal indicated the complaint was going to be dismissed without prejudice, but that the order dismissed the complaint with no qualification. The petitioner did not object to the form of the order of dismissal but instead prosecuted an appeal to the Colorado Supreme Court. The final order was the only thing from which petitioner could appeal, *Nutter* v. *Wright*, ... Colo. ....., 287 P. 2d 655 (1955), and the cases there cited. Rule 41(b) (1) of the Colorado Rules of Civil Procedure provides:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision *and any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or failure to file a complaint under rule 3, *operates as an adjudication upon the merits.*" [Emphasis supplied.]

The case of *O'Done* v. *Shulman*, 124 Colo. 445, 238 P. 2d 1117 (1951), holds that the emphasized part of the above rule means exactly what it says. Also, the same judge who dismissed the former complaint dismissed the present complaint on the ground of *res judicata* after hearing arguments from both parties.

The decision of the Supreme Court of Colorado concerned only matters pertaining to Colorado rules, procedure and practice, and since the petitioner was heard in the District Court and in the Colorado Supreme Court and re-

ceived essentially the same treatment afforded other litigants, it was not denied due process or equal protection of the laws.

The writ of certiorari should therefore be denied.

Respectfully submitted,

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